IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 296

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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July 20, 1964.

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Petitioner, The Goodyear Tire & Rubber Company (hereinafter "Goodyear"), prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit in the above-entitled case. The opinion and order of the Court of Appeals were rendered on April 24, 1964 and a final decree was entered on May 20, 1964.

Opinions Below.

The court below affirmed an order to cease and desist entered by the Federal Trade Commission (hereinafter the "Commission") because of an alleged violation of Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U. S. C. §45(a)(1) (1953).

The Initial Decision of the Hearing Examiner (R. 94),* which recommends dismissal of the complaint against Goodyear, is reported at 58 F. T. C. 309 (1961) and is printed as Appendix A hereto.** The Commission's order (R. 114) and its opinion reversing the Examiner (R. 118) are reported at 58 F. T. C. 309 beginning at page 323 and are printed as Appendix B hereto.

The opinion of the Court of Appeals affirming the Commission is reported at 331 F. 2d 394 and printed as Appendix C hereto.

Jurisdiction.

The order (Appendix D) and the final decree (Appendix E) of the Court of Appeals were entered on April 24, 1964 and May 20, 1964, respectively. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) (1958).

Questions Presented.

Goodyear has sales commission agreements with The Atlantic Refining Company ("Atlantic"), its co-respondent in the instant proceedings before the Commission, and with some twelve other non-respondent petroleum companies. Pursuant to these agreements Goodyear pays commissions to an oil company in return for the latter's assistance in promoting the sale through its dealers of Goodyear tires, batteries, and accessories ("TBA" or "TBA products").

No conspiracy between Atlantic and Goodyear was alleged or found. It is undisputed that Atlantic entered into its sales commission agreement with Goodyear because

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* "R." refers to the Joint Appendix (in five volumes) filed in the Court of Appeals.

** The Appendix to this petition is voluminous and is therefore separately bound and presented.

it had already used the only feasible alternative method of TBA distribution and had encountered serious distribution and cost problems. Nevertheless, the Commission found that Atlantic's "power" with respect to its dealers made the sales commission agreement with Goodyear an "unfair method of competition" within the meaning of the Federal Trade Commission Act §5(a)(1).

As to the non-respondent oil companies, there is no significant evidence of record concerning their dealer relationships or the presence or absence of oil company "power" to influence TBA sales. Nevertheless, the Commission entered an order barring Goodyear from any further participation in any sales commission agreement, not only with Atlantic but with any marketing petroleum company.

The Court below approved the Commission's action. There are thereby raised the following significant questions concerning the proper administration of the Act:

(1) Is the sales commission agreement with Atlantic totally unlawful merely because Atlantic has the ability, without the exercise of coercion or use of tying agreements, to influence the purchase of a substantial volume of TBA products?

(2) Is a sales commission agreement totally unlawful merely because a sponsoring party (in this case any petroleum company) may be able, without the exercise of coercion or use of tying agreements, to influence the purchase of a substantial volume of the sponsored product (here TBA)?

(3) May the Commission dispense with any attempt at market analysis and establish a conclusive presumption that any oil company which has leases with, or lends equip-

ment to, its franchised dealers has the ability, deemed unlawful, to influence the requisite "substantial" volume of sales of the sponsored product?

(4) May the Commission altogether outlaw a time-tested method of distribution which offers undisputed benefits to the public and to all parties concerned without considering the possibility of more limited alternative remedies?"

Statute Involved.

The statute involved in this case is Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U. S. C. §45(a) (1958), which in pertinent part provides that:

> "(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * *
>
> "(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Statement.

A. The Litigation Context.

This is a far-reaching case and the first of its kind to come to this Court. It involves an attempt by the Commission to prohibit totally a traditional and widely used method of distributing TBA products. This method is known as "sales commission" distribution.

The amended complaint, issued on May 22, 1956 (R. 5), joins as respondents Goodyear, The Goodyear Tire & Rub-

ber Company, Inc.,* and Atlantic. Goodyear is a large manufacturer of rubber products (R. 157, App. B 38). Atlantic is a medium-sized producer, refiner, and distributor of petroleum products. It markets its "Atlantic" brand of automotive gasoline and related petroleum products through retail outlets and wholesale distributors in 17 eastern states and in the District of Columbia (R. 28; R. 96, App. A 3).

The complaint attacks the legality of a contract entered into by Goodyear and Atlantic in 1951 whereby Goodyear pays sales commissions to Atlantic for assistance in promoting the sale of Goodyear TBA products through Atlantic outlets. The complaint also attacks other sales commission arrangements between Goodyear and some 12 other marketing oil companies in the United States. Of these latter companies, only one—the Shell Oil Company—is a national concern. Most are a good deal smaller than Atlantic.** The complaint also questions a substantially similar contract between Atlantic and The Firestone Tire & Rubber Company ("Firestone"), but does not name Firestone as a respondent.

At the time that the Commission initiated the present proceeding it also issued two other complaints—one

* The Goodyear Tire & Rubber Company, Inc. was a wholly-owned marketing subsidiary of Goodyear which was merged with Goodyear in 1956 (R. 1). This fact is not significant to this litigation, and both Goodyear respondents are hereinafter collectively referred to as "Goodyear".

** The petroleum companies which the record shows as having sales commission arrangements with Goodyear were: Anderson-Prichard Oil Corporation, Ashland Oil & Refining Co. Inc (and certain subsidiaries of Ashland), Atlantic Refining Company, Carter Oil Company, D-X Sunray Oil Company, Frontier Oil Refining Company, Quaker State Refining Corporation, Richfield Oil Company, Shamrock Oil and Gas Corporation, Shell-American Petroleum Company, Shell Oil Company, Sinclair Refining Company and Sherwood Brothers Inc. (R. 119, App. B 2; R. 2493, 2503)

against Firestone and the Shell Oil Company ("Shell") and the other against the B. F. Goodrich Company ("Goodrich") and the Texas Company ("Texaco"). These latter complaints attacked sales commission agreements which the respective respondents had with each other and which each of the respondents had with other companies for the sale of TBA products.

The three complaints were tried before the same Hearing Examiner,* who conducted hearings over a two-year period from October, 1956 to February, 1959. The Examiner thereafter devoted many months to briefings, to his review of voluminous transcripts (3,887 pages in the instant case) and exhibits, and to the preparation of his opinions. In October, 1959 he filed his Initial Decisions which, in each of the three dockets, recommended dismissal of the complaints against the rubber companies.

The Commission reversed in all three cases. It entered orders which altogether bar the rubber company respondents, including Goodyear, from participating in any sales commission plan with any petroleum company and which bar the oil company respondents from participating in any sales commission plan for the sale of TBA.**

Petitions to review and to set aside the Commission's orders followed in all three cases. Goodyear and Atlantic each filed a petition to review with the Court of Appeals for the Seventh Circuit. That court rejected the petitions and affirmed the Commission (App. C). The instant peti-

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* Earl J. Kolb, later appointed the Commission's chief of hearing examiners.

** In the *Goodrich-Texas* case, the Commission initially remanded the case to the Hearing Examiner for further hearings as to the competitive effects of the sales commission agreements of the two companies. After such hearings, the proceeding returned to the Commission which then entered an order explicitly based on the original record. See *Matter of The B. F. Goodrich Co.*, 58 F. T. C. 1176 (1961), and CCH Trade Reg. Rep. 1961-63 Transfer Binder ¶16,378 (1963).

tion for a writ of certiorari, and a separate petition for such writ being filed by Atlantic, ask this Court to review the aforesaid determinations of the Seventh Circuit.

Meanwhile, petitions to review and to set aside the Commission's orders in the two other proceedings are before two other Courts of Appeals. The *Firestone-Shell* appeals were argued before the Court of Appeals for the Fifth Circuit on January 16, 1964. Goodrich and Texaco sought review from the Court of Appeals for the District of Columbia Circuit, which heard argument on April 10, 1964. These courts presumably will render their decisions in the near future.

B. The Commercial Context.

The sales commission method of distribution has been widely used, for more than two decades, to facilitate the marketing of TBA through automobile service stations. Motorists prefer "one-stop" service stations capable of supplying, not only gasoline and oil, but also the full range of products required for the operation of the modern automobile (R. 1505, 1846, 2267-68). As a result, the nation's neighborhood "gas stations" have become, in response to motorists' demands, one of the major sources of supply for replacement TBA products (R. 122, App. B 5).

To meet this consumer demand under contemporary conditions is a complex task. The service station must have access to a wide variety of tires—for example, Goodyear manufactures and markets approximately 130 different popular-sized tire models (R. 2221). In addition, the service station must carry various sizes and types of batteries and a host of accessories such as spark plugs, radiator chemicals, lamps and bulbs, windshield wipers and blades, polishes, waxes, etc. (R. 99-100, App. A 6; R. 517-19).

The efficient provision at point of sale of such a range of products requires knowledge, skill and organization. The service station operator must be trained in several areas: the products available, installation and repair of such products, sound inventory practices and modern sales techniques (R. 1507, 2221-24, 2268). Behind the station operator must stand a well-developed warehousing and distribution system.

Over the years, two methods have developed in the petroleum industry for meeting these marketing needs, One of these is the so-called "purchase-resale" method, which the Commission's opinion approves (R. 183-85, App. B 62-63). Under this method, the petroleum company purchases TBA products and resells them, along with gasoline and oil, to its service station dealers.

"Purchase-resale" has a particular vogue today among the largest petroleum companies, such as Standard of New Jersey (Esso, Humble), Standard of California (Chevron), Standard of Indiana, Socony-Mobil, and Phillips Petroleum. (*Matter of The Firestone Tire & Rubber Company*, 58 F. T. C. 371, 388 (1961)). They have the resources to provide, and a sufficient number of service station outlets to warrant, the necessary investment in warehousing and distribution facilities for TBA. Atlantic made use of the purchase-resale method in earlier days, but gave it up in 1951 when it found that its sales of TBA were insufficient to warrant the costs of training, warehousing and overhead (R. 100-101, App. A 6-7; R. 2357-62, 2859-64).

The second principal method of TBA distribution through service stations is the "sales commission" method involved in this case. It was pioneered a generation ago by rubber companies and oil companies as an alternative to purchase-resale. Goodyear, which manufactures tires and tubes in its own factories and distributes batteries and

accessories acquired from outside sources, entered such a sales commission plan with Atlantic in 1951.

In return for Atlantic's sales assistance, Goodyear agreed to pay to Atlantic a 10% commission on its sales of TBA to Atlantic retailers in seven northeastern states and the Philadelphia area of Pennsylvania and to pay a 7½% commission on TBA sales to Atlantic wholesale distributors in the same area. The Commission did not challenge either the rates of these commissions or the evidence that Atlantic made expenditures approximately equal to them. Moreover, there is no claim that Atlantic wholesalers and retailers who bought Goodyear TBA under this plan did so on different terms from other wholesale and retail customers of Goodyear or that they were required to absorb the commissions paid by Goodyear to Atlantic.

The services which Atlantic supplied to Goodyear in return for its commissions are described in the Hearing Examiner's Initial Decision and are not disputed by the Commission. Atlantic operated training schools for dealers and prospective dealers which included promotional and merchandising aspects of TBA sales; conducted tire clinics jointly with Goodyear personnel to familiarize Atlantic dealers in the care and repair of Goodyear tires; advised prospective new dealers of the importance of TBA and recommended Goodyear TBA products; assisted dealers in arranging for Goodyear TBA inventory; conducted dealer meetings which discussed TBA sales; arranged for advertising and promotion of Goodyear TBA products; suggested methods of TBA merchandising in its dealer magazines; and made Goodyear TBA products available to credit card holders (R. 101-102, App. A 8-9).

The sales commission plan is not an independent source of revenue to Atlantic, but rather aids Atlantic in its competitive efforts to sell gasoline and other petroleum prod-

ucts. Atlantic's commission receipts under its two agreements with Goodyear and Firestone have averaged about ¼ of 1% of its petroleum revenues, and the costs to Atlantic of its participation in the TBA program are approximately equal to its receipts from it (R. 2364).

The Hearing Examiner made clear—and the Commission did not deny—that an oil company TBA program benefits motorists and dealers, as well as oil companies and rubber companies:

> "Tires, batteries and accessories have become a necessary and integral part of the business operation of the Atlantic dealer. He cannot profitably and successfully operate his business without the added revenue from that portion of his business which also enables the dealer to give complete service to his customers. The service station is important to TBA manufacturers as an outlet for distributing to customers. It is to the interest of The Atlantic Refining Company to have its dealers engaged in the sale of TBA as this builds a stronger dealer organization and increases the sale of gasoline." (R. 99-100, App. A 6)*

The Commission's order would altogether outlaw sales commission distribution by condemning it, in every case and regardless of its manner of implementation, as an "unfair method of competition" within the meaning of FTC Act § 5(a)(1). The order bars Goodyear's participation in any sales commission agreement with any oil company of whatever size and regardless of the nature of that company's relationship with its dealers.

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* The court below found that TBA products were essential to efficient service-station operations, that dealers must be trained and kept informed of TBA product changes and that every major oil company offers some type of TBA training program to its dealers (331 F. 2d 394, 397, App. C 6-7).

C. Operation of Goodyear's Sales Commission Plans.

Although the Commission has wholly condemned all of Goodyear's sales commission agreements, the evidence relates almost entirely to the operation and effect of the agreement with a single oil company, Atlantic.

The record, which describes the situation obtaining in 1955-56, shows that Atlantic distributes its gasoline and other automotive petroleum products to some 5,500 retail dealers, of whom some 2,400 are in the area covered by the Atlantic-Goodyear sales commission agreement (R. 140, App. B 22). In that area, in addition, Atlantic sells its petroleum products to some 47 wholesale distributors who service about 390 retail outlets (R. 146, App. B 27). Most of these gasoline retailers operate service stations which are likely to offer TBA (as contrasted to the country store or roadside restaurant which may have a gas pump, without more, in the yard).

The retailers serviced directly by Atlantic are of two types—lessee dealers and contract dealers. The former lease their stations from Atlantic, mostly for a term of one year, but often for longer periods (R. 140, App. B 22). The latter own their stations or rent them from lessors other than Atlantic; their contracts with Atlantic frequently provide for the loan by Atlantic of items of station equipment and generally call for the purchase by the dealer of a specified minimum amount of gasoline during the course of a year (R. 144, App. B 25-26).

Goodyear operates tire and tube factories in five states and 57 warehouses in all parts of the country. It markets its automotive products through 500 company-owned and operated stores and about 12,000 independent franchised dealers. Many of these outlets sell at both wholesale and retail (R. 157-58, App. B 38).

Atlantic advised all of its dealers in writing, both at the time of the plan's inception in 1951 and on several occasions thereafter, that they were under no obligation to buy Goodyear TBA despite its sponsorship by Atlantic.* Counsel supporting the complaint offered the testimony of eight former Atlantic dealers, all from the Philadelphia area, and of eight former dealers from areas not encompassed by the Goodyear-Atlantic agreement. Some of them testified that, despite the letters from Atlantic, certain of the latter's salesmen overtly or impliedly threatened them with sanctions if they failed to purchase sufficient amounts of Atlantic-sponsored TBA (R. 104, App. A 10).

Atlantic, in rebuttal, introduced the testimony of 38 dealers and ex-dealers who testified to selling non-sponsored TBA without objection from Atlantic (R. 108-09, App. A 14). It also was shown that petroleum companies compete aggressively for the services of qualified dealers, who often are local businessmen with established "followings" in their neighborhoods (R. 1493-1497, 2353). Thus, Atlantic would have scant incentive to jeopardize its basic business—the sale of petroleum products—by making demands on a dealer with respect to TBA, on which Atlantic makes no profit.**

* Atlantic stated: "However, your acceptance or rejection of the program is a matter of your own choice." (R. 2892); "[U]nder no circumstances are our dealers to be made to feel that they must buy this new program just because they are Atlantic dealers" (R. 2891) and "If any of our people at any time insist on your buying any certain product or merchandise against what you feel is to your best interest, I want you to call the matter directly to my attention" (R. 3038). The last-cited letter is contained in Atlantic's franchise manual (which is reviewed with all prospective dealers) and is furnished to all new Atlantic dealers (R. 1438-40, 1780, 1920-21, 2025-26).

** The undisputed evidence is that there is "considerable expense" in replacing a dealer (R. 1496-97).

The Examiner found that no Atlantic dealer had confined his purchases of TBA to Goodyear or Firestone TBA and that all dealers "carried some non-sponsored TBA to satisfy demands of their customers . . ." (R. 109, App. A 15). He also concluded that Atlantic had induced a substantial number of its dealers to purchase sponsored TBA and to discontinue the purchase or display of non-sponsored TBA by pressure and coercion (R. 110, App. A 16); at the same time he found Atlantic's contractual relationships with its dealers to be not unreasonable, and his proposed order sought only to prohibit acts of coercion by Atlantic (R. 111-13, App. A 16-19). As to Goodyear, the Examiner found:

> "There is no evidence that The Goodyear Tire & Rubber Company, or The Goodyear Tire & Rubber Company, Inc., engaged in, or participated in, any of acts or practices designed to force dealers and distributors of The Atlantic Refining Company to purchase Goodyear TBA products." (R. 110, App. A 16)

With respect to the actual operations of Goodyear's sales commission agreements with other oil companies, the evidence is virtually non-existent. The Hearing Examiner makes no mention whatever of these agreements and the opinion of the Commission does little more than note the existence of such agreements.* There is certainly no finding by the Examiner or the Commission that each one of such other oil companies coerced or pressured (or had

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* Although the Hearing Examiner made no such finding, the Commission found that Goodyear's agreements with non-respondent oil companies "are in all material respects identical with the Goodyear-Atlantic contract" (R. 162, App. B 42). Neither the Commission nor the Court below, however, specifically found either that Goodyear's various arrangements with non-respondent oil companies were similar *in operation* to the Goodyear-Atlantic arrangement or that such non-respondent oil companies' relations with their dealers were similar to those between Atlantic and its dealers.

the power to coerce or pressure) its dealers to purchase Goodyear TBA.

As in the case of the Atlantic agreement, the outlets of such other oil companies are served by "supply points" comprised of some, but not all, of Goodyear's dealers. The Commission's decision attaches great adverse significance to this fact (R. 172, App. B 52). Nevertheless, there is no supporting finding, and, indeed, no evidence, that any competent Goodyear dealer was denied an opportunity to become a "supply point" or that any such dealer who was not a "supply point" was interested in becoming one.*

D. Rulings Below.

The Hearing Examiner found no fault with Goodyear's conduct and nothing wrong with the concept of its sales commission agreement with Atlantic (or with any other oil company).

Specifically, the Initial Decision concludes that

—there was neither charge of nor proof of a conspiracy between Goodyear and Atlantic or anyone else to restrict competition in the sale of TBA (R. 110, App. A 16);

—neither Goodyear's sales commission agreement with Atlantic nor the latter's agreements with its dealers required said dealers to purchase only Goodyear TBA (R. 110-11, App. A 16);

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* The record does show that the majority of the 128 "supply points" servicing the outlets covered by the Atlantic-Goodyear sales commission agreement are independent franchised dealers, not Goodyear-owned outlets (R. 525). They must maintain the facilities and staffs required to keep contact with and to effect deliveries to the service stations. These often include special delivery trucks and driver salesmen. The supplying dealers also make to Goodyear the sales reports on which commissions to Atlantic are based. They receive no extra compensation for their participation in the sales commission plan (R. 525).

—"The consideration for the payment of commission to Atlantic under the sales commission contract is based upon substantial services rendered by Atlantic in promoting the sale of Goodyear TBA to Atlantic dealers and distributors" (R. 111, App. A 17);

and that

—the terms of the contracts and leases between Atlantic and its dealers were not unreasonable and did not themselves confer upon Atlantic control sufficient to require its dealers to carry only sponsored TBA (R. 111, App. A 17).

The proposed order directed Atlantic to cease and desist from coercing or attempting to coerce its dealers to carry sponsored TBA, but dismissed the complaint against Goodyear (R. 112-13, App. A 18-19).

Goodyear believes the finding that Atlantic pressured or coerced its dealers to carry sponsored TBA to be unjustified; however, this point is not raised as an issue in this petition, since the finding is not fundamental to Goodyear's position here. As the Examiner recognized, the finding about Atlantic's conduct, if valid, should properly affect only the relief ordered against Atlantic. The Commission, however, has gone far beyond the finding to strike down all then-existing sales commission agreements between Goodyear and other petroleum companies as to which no similar finding has been made or is possible.*

The Commission attempted to achieve this latter result by asserting that "these overt acts of coercion [by Atlantic] are mere symptoms of a more fundamental restraint of trade inherent in the sales commission system itself."

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* Struck down, in addition, are a number of sales commission agreements between Goodyear and small petroleum companies entered into after 1956, the last year of the record.

(R. 156-57, App. B 37). The issue, in the Commission's view, was not the parties' conduct, but "the legality of respondents' use of a *particular method* of distributing TBA products." (R. 181, App. B 60; emphasis in original).

The Commission found that

> "Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic." (R. 181, App. B 60-61)

The Commission cited *Northern Pacific Ry.* v. *United States,* 356 U. S. 1 (1958), but stated it would "not rest its decision on a mechanical application of the rule" of that case. Rather:

> "Determination of illegality in this context requires an evaluation of competitive effects resulting from the sales commission method of distributing TBA used by these respondents." (R. 181, App. B 61)

The Commission, after purportedly evaluating these effects, concluded that Goodyear's sale commission agreement effectively closed a market, which it defined as one consisting of Atlantic dealers in the area covered by the plan, to the TBA of other manufacturers. Without any specific evidence, the Commission also seems to have concluded that Goodyear's sales commission agreements with other oil companies resulted in a foreclosure of other markets similarly defined in terms of a particular oil company's retail outlets.

The Commission further concluded, again without specific evidence, that Goodyear's use of "supply points"

to handle sales to its service-station customers restricted competition among Goodyear's retail and wholesale dealers.

On the basis of these conclusions, the Commission rejected the Examiner's recommended order and entered an order which outlaws, not only the agreement between Goodyear and Atlantic, but any sales commission agreement between Goodyear and any oil company.

The Seventh Circuit affirmed, its opinion finding that there was substantial evidence to warrant the Commission's conclusions.

The Court justified the Commission's sweeping order against Goodyear by treating it solely as a matter of proper remedy. The opinion is content to deal with the issue by a bare quotation of one paragraph of this Court's opinion in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473 (1952), which states that the Commission's remedial power is not limited to prohibition of illegality "in the precise form in which it is found to have existed in the past" (331 F. 2d at 403, App. C 18).

REASONS FOR GRANTING THE WRIT.

I.

The case involves an issue of fundamental importance to the American economy.

The Commission seeks to abolish a system of TBA distribution which is of such significance to the national economy that this Court should review the propriety of the Commission's action.

The decisions of the Commission and Court below do not actually rely upon any detailed evaluation of facts peculiar to this case. Rather, the Commission's decision and order, upheld by the Court below, are based on what may fairly

be described as a legislative judgment that all forms of sales commission merchandising in any industry where franchised-dealers are lessees or borrowers of equipment are, in all circumstances, "unfair methods of competition".

Although the Commission's views are entitled to weight, the question of what constitutes an "unfair method of competition" within the meaning of Section 5(a)(1) of the Act is ultimately a question of law to be decided by the courts. See *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.,* 291 U. S. 304, 314 (1934); *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427 (1920). The question of whether the sales commission method of marketing is *per se* an "unfair method of competition" is ripe for review by this Court. The issue is as clearly framed by the present record as it ever will be.

The number and scope of the interests which the Commission's decision affects are great. The Commission's opinion in the companion *Firestone-Shell* proceeding indicates that, in the petroleum industry alone, at least 28 different petroleum companies have sales commission agreements which are outlawed by the Commission's order in this case and in the two companion proceedings. (*Matter of Firestone Tire & Rubber Co.,* 58 F. T. C. 371, 383-84 and fn. 1-3 (1961)). These agreements were applicable, at the time of the record, to over 50,000 service stations and involved annual TBA sales in excess of $150,000,000 (58 F. T. C. at 352, 401, 1181; R. 3406).

These agreements confer important benefits, not only on the rubber companies such as Goodyear, but also on the petroleum companies, the service station operator, and the American motorist. As noted, the Hearing Examiner found this to be true of TBA product distribution (R. 99-100, App. A 6) and the Commission has not denied it.

The Commission has not only ignored the benefits provided by the sales commission method. It also nowhere discusses the fundamental economic setting of these proceedings. Its decision approves the purchase-resale system of distribution without considering the fact that Atlantic, a medium-sized company, abandoned purchase-resale as uneconomic for its size of operation. The Commission is mute as to the basic facts of economic life—namely, that medium and small-size petroleum companies are engaged in fierce competition with the largest petroleum companies —and that the sales commission system is particularly well adapted to the needs of smaller oil companies (and consequently their dealers) who, like Atlantic, may not be able economically to sustain the warehousing and distribution expenses of a purchase-resale system.

The sales commission system has been a natural and widespread response by smaller petroleum companies to the imperatives of TBA merchandising. It is a system, as well, which has a potential application in almost any of the growing marketing fields which are served by franchised dealers. Whether the benefits of the sales commission method are sufficiently outweighed by adverse effects to warrant its *per se* condemnation as an "unfair method of competition" is surely a question which should be reviewed by this Court.

II.

The Commission's treatment of sales commission plans violates controlling law.

The Commission, by its sweeping order barring Goodyear from participation with any petroleum company in any TBA sales commission program, has defined in this proceeding a new "unfair method of competition".

The Commission's decision so characterizes any sales commission plan involving sponsorship of a product by a franchisor (in this case an oil company) which "has sufficient economic power with respect to its [dealers] to cause them to purchase substantial quantities" of the sponsored product. In addition, the Commission's decision establishes, at the very least, a presumption (requiring no proof on the part of the Commission) that any franchise system in which leases or equipment loans play a part endows the franchisor with such power.

The doctrine thus enunciated conflicts with principles which this Court has recognized in applying the competitive policies at the base of the Federal Trade Commission Act and of the antitrust laws. It is submitted that if the doctrine is not erased by this Court, its application by the Commission in this and in other administrative proceedings will have pernicious effects on the national economy.

Goodyear has sales commission agreements with numerous non-respondent oil companies as to whom no finding of dealer-coercion is made or is possible.* It is patently unsound reasoning which has led the Commission to condemn all of these agreements without reference to facts concerning their operation or effect.

"The issue" in this proceeding, as the Commission's opinion plainly states, "is the legality of . . . a *particular method* of distributing TBA products", *viz.*, the sales commission method (R. 181, App. B60) (emphasis in original). The reasoning through which the Commission condemns every use of this method by Goodyear involves two

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* The Commission devotes seven pages of its opinion to a review of the evidence bearing on coercion by Atlantic and concludes "that the record contains ample evidence to support the hearing examiner's finding that Atlantic has coerced a substantial number of its dealers to purchase sponsored TBA." (R. 156-57, App. B 37). The opinion's only other reference to dealer coercion concerns two incidents involving Sinclair in 1948 (R. 162-64, App. B 42-44).

steps, each of which brings the Commission into square conflict with pertinent decisions of this Court.

First, the Commission concluded that the petroleum company respondent before it, *viz.*, Atlantic, had "sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA *even without the use of overt coercive tactics or of written or oral tying agreements*" and that this power had the effect of giving Goodyear an advantage in the competition for the business of Atlantic dealers (R. 181, App. B 60-61) (emphasis supplied). This, in the Commission's abstract view, defined an unfair method of competition warranting abolition of a sales commission agreement.

Second, with respect to Goodyear's agreements with the non-respondent oil companies, the Commission's opinion merely notes that "Goodyear has sales commission contracts with a number of other marketing oil companies, and the agreements are in all material respects identical with the Goodyear-Atlantic contract" (R. 162, App. B-42). To reach and condemn these agreements, the Commission has obviously presumed, from the mere existence of a franchise system between oil company and dealer, the possession by each oil company of the requisite power to cause what the Commission considers improper economic effects.*

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* The Commission's opinion does not articulate this step of its analysis since it jumps, without explanation, from the fact of Goodyear's sales commission agreements with non-respondent oil companies to their condemnation. Two recent consent orders of the Commission indicate, however, that the Commission, again without articulation, is perfectly willing to contradict itself.

In *Matter of Kaiser Jeep Corp.*, FTC Dkt. C-739 (Order of April 27, 1964), and *Matter of O. K. Rubber Welders, Inc.*, FTC Dkt. 8571 (Order of June 19, 1964), the Commission agreed to Consent Orders which did not outlaw the franchisor's sales commission plan, but simply ordered the franchisor to cease and desist from coercing its dealers to carry the sponsored product.

A. Economic Influence as "Unfair" Competition.

According to the doctrine of the Commission in this case, a sales commission agreement must fall if there exists, without more, a possibility that the franchisor (*e.g.,* a petroleum company) can influence a substantial volume of sales of a sponsored product (*e.g.,* Goodyear TBA) to dealers who are free to respond to the influence or not as they see fit.

In adopting this view, the Commission has ignored its obligation, when appraising a competitive method not marked by deception or overt restraint, to weigh the advantages of and justifications for the method under attack before condemning it as unlawful *per se.*

This Court has insisted upon that much even when appraising arrangements which are overtly restrictive. Speaking in *White Motor Co.* v. *United States,* 372 U. S. 253 (1963), of White's vertical territorial limitations among its distributors and dealers, this Court noted that such a limitation "may or may not have that purpose or effect [*viz.,* the stifling of competition]".

> "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business (*cf. Brown Shoe, supra,* at 330 of 370 U. S.; *United States* v. *Jerrold Electronics Corp.,* D. C., 187 F. Supp. 545, 560-561, *aff'd,* 365 U. S. 567) and within the 'rule of reason' " (372 U. S. at 263).

Moreover, the Commission's doctrine takes no account of the fact that petroleum companies and most other franchise operators make valuable trademarks available to their dealers. By paying no heed to this fact, the Commission

casts doubt on the well established rule that the existence of a trademark legitimates forms of influence and "control" by its owner which might not be proper in other circumstances.

This has been recognized, for example, in the recent decision of the Court of Appeals for the Second Circuit in *Susser v. Carvel Corp.*, 1964 CCH Trade Cases ¶ 71,103 (2d Cir., May 8, 1964). In that private action under the antitrust laws, the Court held that Carvel, operator of a franchised chain of frozen custard stands in the Northeast, could require its dealers to handle only Carvel-approved products, saying,

> "The antitrust laws certainly do not require that the licensor of a trademark permit his licensees to associate with that trademark other products unrelated to those customarily sold under the mark. It is in the public interest that products sold under one particular trademark should be subject to the control of the trademark owner. See *E. I. du Pont de Nemours & Co. v. Celanese Corp. of America, supra; Arthur Murray, Inc. v. Horst, supra; Morse-Starrett Prod. Co. v. Steccone, supra.* Carvel was not required to accede to the requests of one or another of the dealers that they be permitted to sell Christmas trees or hamburgers, for example, which would have thrust upon Carvel the obligation to acquaint itself with the production and sale of these items so as to establish reasonable quality controls.
>
> "Nor do the antitrust laws proscribe a trademark owner from establishing a chain of outlets uniform in appearance and operation. Trademark licensing agreements requiring the sole use of the trademarked item have withstood attack under the antitrust laws where deemed reasonably necessary to protect the goodwill interest of the trademark owner . . ." (p. 79,362).

Here, the Commission's resort to a simple quantitative test—the dollar amount of sponsored TBA products sold to franchised dealers—to appraise a sales commission plan not only disregards, but precludes consideration of, such contextual justifications. In the present case the Commission has ignored in fact, as its formula ignores in theory, the competitive needs of the petroleum companies which entered sales commission agreements with Goodyear.

To compete effectively at the retail level a petroleum company must have a TBA program. The nub of the matter is simply stated. Petroleum companies must be concerned with and have a right to attempt to influence the kind and quality of TBA products which are sold in the service stations carrying their gasoline brand name. Companies such as Standard Oil of New Jersey and Socony-Mobil achieve this through purchase-resale. A sales commission agreement with Goodyear is a means through which companies such as D-X Sunray and Shamrock can match their giant rivals.

Moreover, the Commission's action is irrational. Its decision to make the mere possibility of sales influence by the petroleum company the touchstone for the validity of a TBA sales commission agreement lacks logic, since the Commission here has specifically approved petroleum companies' participation in the purchase-resale of TBA. As the Commission's opinion itself notes, a petroleum company's power *vis-a-vis* its retail dealers "is a fact existing independently of the particular method of distributing or sponsored TBA used . . ." (R. 181, App. B 61). The Commission offers no reason (and common sense suggests none) why a petroleum company would exert less pressure upon its dealers in promoting the sale of its own TBA than in promoting the TBA of a party to a sales commission agreement.

Given the possibility of petroleum company persuasion of its dealers, a sales commission plan has no significant difference from a purchase-resale program. The Commission opinion labors to suggest differences, but its efforts do not hold water.

Thus, the Commission argues that, under a sales commission plan, the supply points of the rubber company involved in a plan "are assured of a substantial chunk of the market before the competitive race at the wholesale level begins" (R. 184, App. B 63). But, under purchase-resale, the petroleum company would be assured of the same "substantial chunk" at the start of the race.

The Commission also suggests that, since smaller rubber companies lack the distribution facilities and full product lines of the larger ones, they cannot compete for sales commission business, while they can compete for the business of petroleum companies marketing TBA by purchase-resale (R. 185, App. B 64). This argument is too glib, however, since the Commission did not prove—nor could it—that small rubber companies do not have sales commission agreements with petroleum companies. In any case, a method of competition can scarcely be illegal because one company offers a broader range of products and service than another.

Finally, in focusing on the possibility of influence by, rather than the actual conduct of, the franchisor as the basis for its condemnation of TBA sales commission plans, the Commission conflicts with a clear expression of Congressional policy. In the mid-1950's, there was much concern over the power which automobile companies had to influence the purchase of cars and other products by their franchised dealers. In 1956, the Congress responded to this concern by enacting, as a declared "supplement" to the antitrust

laws, the so-called Automobile Dealers' Day in Court Act, 70 Stat. 1125, 15 U. S. C. §§1221-25 (1958).

Under that act an automobile dealer was given the right to sue in the district courts for damages if his manufacturer failed:

> ". . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise with said dealer."

Good faith was defined in the act as follows:

> "The term 'good faith' shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.*" (emphasis supplied)

The economic power of an automobile company *vis-a-vis* its dealers is no less than the power of an oil company *vis-a-vis* its service station operators. Yet, in the dealers' statute, the Congress plainly held that an automobile company might actively influence its dealers to buy, provided that that influence was employed in a non-coercive way.

The legislative history of that statute makes it clear that it was contemplated that it could serve as a precedent for use in other industries such as the petroleum industry. See H. Rep. Committee on the Judiciary, Antitrust Sub-

Committee, Hearings on H. R. 11360 and S. 3879, 84th Cong., 2d Sess. (1956)*.

The Hearing Examiner applied that precedent to his view of the facts in this case. The Commission did not; it substituted instead a simple quantitative test of illegality which treats actual conduct as irrelevant and ignores all of the many justifications for the sales commissions method of TBA distribution. This doctrinal innovation should be reviewed and reversed by this Court.

B. Presumption of Sales Influence.

The Commission's decision does more than measure the legality of sales commission agreements by a naked and unadorned quantitative test of the amount of sponsored TBA products sold by oil company dealers. The decision also erects a presumption that the business operations of any sponsoring franchisor having lease or equipment loan arrangements with dealers meet this novel and unsound test.

It is solely on the basis of such a presumption that the Commission was able to reach and to condemn Goodyear's sales commission agreements with all non-respondent oil companies.

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* In this connection it also is of interest to note that a bill identical in all material respects to the Automobile Dealers' Day In Court Act, but aimed at oil companies, was introduced in the House the following year. See H. R. 425, 85th Cong., 1st Sess. (1957). Also at least two bills intended to outlaw the sales commission plan have been introduced. See H. R. 428, 85th Cong., 1st Sess. (1957) and H. R. 9894, 86th Cong., 2d Sess. (1960). Similarly there have been bills aimed at purchase-resale, see H. R. 5926, 87th Cong., 1st Sess. (1961); S. 2480, 87th Cong., 1st Sess. (1961), and at exercise of control generally with respect to the reselling of gasoline or petroleum products as well as TBA, see H. R. 426, 85th Cong., 1st Sess. (1957). Despite this activity, no such bills have ever been reported out of committee, and the Congress has refused to act.

To determine the influence of Atlantic over its retail outlets, the Commission reviews at length the contractual relationships which link that company and its dealers and notes the different positions *vis-a-vis* Atlantic of its lessee and contract dealers (R. 139-47, App. B 21-28). And to measure the effect of this influence, the Commission's opinion makes some effort (though hardly sufficient) to assess Atlantic's market position in the Northeast (R. 139, App. B 21).

But, in the case of the non-respondent oil companies, there are no findings and, more importantly, no evidence which would permit such findings had the Commission thought it pertinent to make them.* The Commission's opinion does no more than note the aggregate volume of Goodyear's sales under its sales commission agreements with these other companies (R. 162, App. B 42).

The Commission's presumption that all sales commission agreements violate its new standard of legality for such agreements runs roughshod over controlling authorities of this Court. Even if there were merit to the Commission's touchstone of oil company "power" for testing such agreements, it seems clear that proof of such "power" is necessary and that the burden of proof should be on the Commission.

The Commission's presumption evades the need for market analysis. It permits the Commission to speak of a sponsor's "power" to influence a "substantial" volume of sales, while at the same time sparing the Commission the burden of determining what, in a particular context, "power" or "substantial" means. Yet meaningful analysis has been required heretofore in appraising outright require-

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* There is not even any evidence of the amount or value of gasoline sold by these companies individually or collectively.

ment contracts, tie-in sales, and mergers, let alone the milder arrangement here.*

The only market facts that the Commission conceivably can infer from the present record is that the amounts of gasoline sold by the non-respondent petroleum companies and the amounts of TBA sold by Goodyear to the retail outlets of these companies are not, in some absolute dollar sense, *de minimis*. But neither such fact has been sufficient heretofore to establish an actionable restraint.

Size alone, unrelated to countervailing competitive forces, provides no reasonable foundation for an inference, let alone a conclusive presumption, that a seller is in a position to pressure its customers into taking a product they would rather purchase elsewhere. This Court made this clear in at least two recent decisions considering tying arrangements under the antitrust laws. See *Northern Pacific Ry.* v. *United States*, 356 U. S. 1, 6-7 (1958); *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953).

In addition, it seems clear that the substantiality of alleged foreclosure represented by Goodyear's sales of TBA to stations covered by sales commission agreements cannot be determined without a comparative reference. What portion of the TBA market is involved?** To proceed without such a comparative reference conflicts with the approach of

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* The non-respondent petroleum companies with which Goodyear has or had sales commission agreements present a variety of different situations which the Commission has simply swept under the rug. The companies are of different sizes, operate in different areas, face different competitors, have different positions in their respective markets, provide markets for differing amounts of TBA, operate with different types of dealer outlets, etc.

** One market figure is clear from the record. In 1955 Goodyear TBA sales under its agreement with Atlantic were less than \$6,000,000 (R. 133, App. B 14). These sales were approximately 15/100 of 1% of the annual national replacement TBA market in the mid-1950's, estimated in the record to be 4 billion dollars (R. 3103).

this Court's recent decision in *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

There a requirements contract was upheld under Section 3 of the Clayton Act even though it foreclosed $128,000,000 worth of business over a 20-year term. For when viewed in its market setting, this undeniably large sum of money represented an insignificant portion of the total market.

> "To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence" (365 U. S. at 329).*

This Court's decision in *Tampa Electric* has a deeper significance, as well. It teaches that market definition and analysis must become increasingly sophisticated if the antitrust laws are, indeed, to serve as a charter of economic liberty in our complex society. The Commission's contrasting superficiality in a matter of this importance warrants review by this Court. The Commission's uninformed action, if tolerated here, will have obviously far-reaching and obviously undesirable implications for the whole field of antitrust enforcement.

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* This Court has also made clear that the relevant market setting is the key to legality of mergers. See *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 343 (1962) and *United States* v. *Continental Can Co.*, ... U. S. ....., 32 U. S. Law Week 4642, 4646 (June 22, 1964).

The Commission may seek, perhaps, to justify its presumption by characterizing it as a rebuttable one. But, as this Court pointed out in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U. S. 61 (1953), the burden of proof in a matter of this sort properly rests with the Commission.

In that case, brought under Section 2(f) of the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U. S. C. §13(f) (1958), this Court held that even after the Commission had shown that respondent buyer knew he had obtained a price differential from his vendor, the Commission had the burden of coming forward with evidence to show that cost savings did not justify the differential. The reasoning which prompted that ruling would condemn, as well, any suggestion that the Commission not bear the burden of proof here.

In *Automatic Canteen,* as here, the Commission, with its broad subpoena power, is better equipped than any respondent to develop the facts. Moreover, here as in *Automatic Canteen,* an attempt by the respondent to develop facts pertinent to its defense "would almost inevitably require a degree of cooperation [with the petroleum companies] ... that may offend other antitrust policies ..." (346 U. S. at 69). As this Court there concluded:

> "[W]e think the fact that the [respondent] does not have the required information, and for good reason should not be required to obtain it, has controlling importance in striking the balance in this case" (346 U. S. at 78).

The Commission has piled novelty on novelty to reach its result in this case. Its actions deserve review by this Court.

III.

The Commission failed to perform its required functions.

In any case—and quite apart from the substantive issues discussed in the preceding Point—the process by which the Commission reached its conclusions violated controlling law.

From the finding against Atlantic the Commission vaulted to a condemnation against any Goodyear sales commission agreement with any petroleum company. The Commission did not consider whether measures short of complete abolition would satisfy its remedial function. It thereby failed to provide a stated basis for judicial judgment of the reasonableness of its sweeping remedy. The failure is compounded by the opinion of the Court below, which, as noted, did not discuss the issue beyond quotation of a paragraph from this Court's opinion in *Ruberoid*.

Such perfunctory treatment does an injustice to the dimensions of the issues to be decided and the character of the Commission's duties. The Commission acted as if it were unaware of *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608 (1946).* This Court there held that the Commission erred in ordering an outright prohibition of the use of a trade name which it had found deceptive; the Commission should have first considered whether measures short of such a drastic remedy would eliminate the deception. As the Court stated:

* This Court recently applied the doctrine of the *Siegel* case in *Gilbertville Trucking Co.* v. *United States,* 371 U. S. 115, 130-31 (1962), and *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 165-67 (1962). See also *Korber Hats, Inc.* v. *Federal Trade Commission*, 311 F. 2d 358, 363 (1st Cir. 1962).

> "For the Commission seems not to have considered whether in that way the ends of the Act could be satisfied and the trade name at the same time saved. We find no indication that the Commission considered the possibility of such an accommodation. It indicated that prohibition of the use of the name was in the public interest since the cease and desist order prohibited the use of the name. But we are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate" (327 U. S. at 613).

The basis of the holding was put as follows:

> "[The Commission's] expert opinion is entitled to great weight in the reviewing courts. But the courts are not ready to pass on the question whether the limits of discretion have been exceeded in the choice of remedy until the administrative determination is first made" (327 U. S. at 614).

The facts here are even stronger than in *Siegel*. The value of a trade name is more than matched by the worth of a traditional marketing practice whose varied benefits were not denied by the Commission. Moreover, the breadth of possible remedies is wider here than in *Siegel*. There, the Commission's function was to adopt a proper remedy with respect to a specific trade name. Here, there is involved a prevalent and important distribution system—and, unlike the *Siegel* situation, there are a variety of remedies as to both petroleum and rubber companies which were open to the Commission's consideration.

Nor would the Commission have been breaking new ground in fashioning a remedy involving petroleum products and TBA which stopped short of total abolition. In *Richfield Oil Corp. v. United States*, 99 F. Supp. 280 (S. D. Cal. 1951), *aff'd per curiam*, 343 U. S. 922 (1952), total

requirements and tying arrangements were voided, but the decree left intact a sales commission plan for automobile accessories. Moreover, in two other litigated cases and a consent decree, the right of the oil company to "sponsor" TBA products was preserved. *United States* v. *Standard Oil Co. of California*, 78 F. Supp. 850, 891 (S. D. Cal. 1948) *aff'd*, 337 U. S. 293 (1949); *United States* v. *Sun Oil Co.*, 176 F. Supp. 715 (E. D. Pa. 1959) (decree unreported); *United States* v. *Standard Oil Co. of California*, 1959 CCH Trade Cases ¶69,399 (S. D. Cal. 1959).*

Thus, the Commission should have at least considered a number of possible remedies to the factors of which its opinion complains. Among them are the following:

1. An injunction against the exertion of undue pressure upon oil company dealers to purchase Goodyear TBA, making clear that dealers were free to purchase TBA products from anyone at any time. This might include requirements that:

(a) All oil company dealers be furnished a copy of the Commission's order;

(b) All oil company dealers be reminded periodically that they have freedom of choice;

(c) All oil company dealer complaints received by the oil company or the rubber company be passed on by the recipient to the Commission with an explanation as to the facts and any corrective measures taken.

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* It was obviously the judicial judgment that the oil company "power" which concerns the Commission could be properly handled by careful circumscription. Among other remedies available if such "power" were to result in undue pressure against a dealer is a treble damage action. See *Osborn* v. *Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1960), *cert. denied*, 366 U. S. 963 (1961).

2. An injunction circumscribing oil company "power" by modifying one or more of such elements of the oil company-dealer relationship as:

(a) Lease terms;

(b) Equipment loans;

(c) Credit card coverage;

(d) Cooperative advertising; and

(e) Joint merchandising.

3. An injunction against an oil company's limitation of a particular sales commission agreement to a geographical portion of its total sales commission arrangements.

4. An injunction assuring that an oil company in its sales commission arrangements affords its dealers an alternative choice of sponsored brands of TBA.

5. An injunction against any limitation of the number of Goodyear "supply points", coupled with requirements that:

(a) The "supply point" function be assigned to anyone who meets objective standards and is willing to assume the responsibilities; and

(b) unless completely impracticable in a particular case, an oil company dealer have more than one supply point available to him.

Instead of considering these or other possible remedies, the Commission issued a naked ukase. Yet, here the alleged violation is not a practice conceived and devoted to illegality. The undisputed evidence is that the sales com-

mission plan performs a variety of beneficial economic functions at every step of the economy. Given such benefits and a finding that Goodyear had not itself pressured Atlantic's dealers, there is no reasonable basis for broad-scale banishment.*

The instant sweeping and punitive order reflects the Commission's failure to make use of its expertise; the Commission was certainly capable of devising a remedy which preserved the positive benefits of sales commission distribution while putting an end to that which the Commission considered improper. The Congress created it to perform that very function; no legislative purpose is fulfilled by inexpert obliteration of an entire marketing institution.

It is submitted that the Commission's process of decision so clearly violates the *Siegel* doctrine in dealing with a matter of substantial importance that review by this Court is required.

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* It is clear that the Commission's remedy must bear some reasonable relation to the alleged violation. See *e.g., National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 226 (1949); *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 217-18 (1933); *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F. 2d 833, 837-38 (2d Cir. 1961), *cert. denied*, 368 U. S. 987 (1962); *Audivox, Inc.* v. *Federal Trade Commission*, 275 F. 2d 685 (1st Cir. 1960); *Elliot Knitwear, Inc.* v. *Federal Trade Commission*, 266 F. 2d 787, 790-91 (2d Cir. 1959).

Conclusion.

The writ of certiorari should issue.

Respectfully submitted,

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